Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

NO. 79-1697

ROWAN DRILLING COMPANY AND
THE FIDELITY & CASUALTY COMPANY OF NEW YORK

Petitioners

VERSUS

JOSEPH A. WINK

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The United States District Court for the Eastern District of Louisiana rendered a Memorandum and Order on April 20, 1977, denying respondent's Motion For Relief From Judgment. The Minute Entry embodying the Order was signed by Judge R. Blake West on July 16, 1977. Copies of the Memorandum and Order and the Minute Entry are contained in Appendix A of this Petition.

The opinion of the Court of Appeals for the Fifth Circuit is reported at 611 F.2d 98 and a copy is contained in Appendix B of this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The Judgment of the Court of Appeals for the Fifth Circuit was entered on February 1, 1980. This Petition for Writ of Certiorari is timely under 28 U.S.C. 2101 (c).

QUESTIONS PRESENTED

I.

Whether there remains any rational basis for the rule that the burden is upon one who relies on seaman's release to show that it was made by the seaman with a full understanding of his rights.

II.

Whether the rule set out in *Garrett v. Moore - McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 2d 239 (1942), that the employer should bear the burden of showing that a seaman's release was entered into by the seaman with a full understanding of his rights, should extend to *judgments*, as well as releases.

III.

Whether the respondent's Motion To Set Aside Judgment was timely filed under the provisions of Rule 60(b) of the Federal Rules of Civil Procedure.

STATUTES INVOLVED

Fed. R. Civ. Proc. 60(b)

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C., § 1655 or to set aside a judgment for fraud upon the court.

Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

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NO.

ROWAN DRILLING COMPANY AND
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Petitioners

VERSUS

JOSEPH A. WINK

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Rowan Drilling Company and The Fidelity & Casualty Company of New York respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on February 1, 1980.

STATEMENT OF THE CASE

On June 4, 1971, plaintiff, Mr. Joseph A. Wink, sustained personal injury during the course of his employment with Rowan Drilling Company when he was struck on the head by a joint of pipe. Subsequently, he was paid maintenance during the time he missed work amounting to $2,620.00, as well as "cure" (medical expenses) in the amount of $6,143.94. After his condition had stabilized and his treating physician had stated that Mr. Wink could return to work, Mr. Wink and his employer agreed to settle his outstanding claim in the amount of $17,500.00. Thereafter, on March 6, 1972, a "friendly Jones Act suit" was filed in the United States District Court for the Eastern District of Louisiana. Jurisdiction was grounded upon the Jones Act, 46 U.S.C. 688, and The General Maritime Law.

Far from constituting a release, which is a private contract, the "friendly Jones Act suit" involved the filing of a Complaint by Mr. Wink, acceptance of service by defendants, Rowan Drilling Company and the Fidelity & Casualty Company of New York, the filing of an Answer and Defenses by defendants, and the filing of a Joint Stipulation of Facts by plaintiff and defendants. Realizing the vulnerability of seaman's releases, this procedure, widely followed in the area, was designed to avoid the problem of "overreaching" by formally appearing in court and presenting the settlement directly to the Judge. With the opportunity to examine all available medical reports attached to the Complaint, and to interview the plaintiff and question him closely to determine whether or

not he is aware of the nature of the proceedings and is entering into the settlement of his claim with a full understanding of his rights, the Judge can either approve the settlement as proper and enter a Judgment in connection therewith or reject the settlement as being in some manner defective or improper.

Accordingly, on March 6, 1972, Mr. Wink and defendants' attorney, Robert E. Peyton, appeared before the late United States District Judge, R. Blake West, and submitted the Complaint, Answer and Defenses, and the Joint Stipulations for the Judge's consideration. After due examination of the medical reports and questioning of the plaintiff, Judge West was satistied that the settlement was reasonable under the circumstances and was adequately understood by the plaintiff. He then signed the Finding of Fact and Conclusions of Law, which stated, *inter alia,* that plaintiff was entitled to recover against defendants the full sum of $17,500.00 In final disposition of the case, Judge West signed a Judgment to this effect.

On June 4, 1974, plaintiff filed a Motion For Relief From Judgment under Fed. R. Civ. Proc. 60(b), alleging that defendants had "misled" plaintiff and the Court as to the extent of plaintiff's injuries; that "the court was misled by the defendant and its insurer as to the extent of complainant's mental competence"; that defendant and its insurer misled the court by representing that plaintiff would be guaranteed a job for the rest of his life; and finally, that the Judgment entered on March 6, 1972, should be set aside "because it was obtained by a fraud upon the court."

At the same time, plaintiff also filed a Seaman's Complaint in the United States District Court for the Eastern District of Louisiana, Civil Action No. 74-1543, seeking to recover damages for personal injury sustained in the accident on June 4, 1971. On November 25, 1974, plaintiff filed a Motion To Transfer and Consolidate both matters which was approved by order of the court.

After the taking of two depositions, several hearings, and the filing of legal memoranda, the Trial Court entered a Memorandum and Order dated April 20, 1977 denying plaintiff's Rule 60(b) motion and dismissing the plaintiff's suit in Civil Action No. 74-1543 on the basis of *Res Judicata*. The court noted that the plaintiff's treating physician, Dr. William Meacham, a neurosurgeon, was of the opinion that plaintiff was fully capable of understanding the proceedings which culminated in the Judgment. He also noted that the report of another doctor who treated Mr. Wink shortly after his accident, Dr. C l F. Culicchia, stated that a neurologic examination showed "no abnormality." The only evidence offered by plaintiff to indicate that he was incapable of understanding the proceedings was the deposition and report of Dr. James Hallman, a Psychologist. Dr. Hallman first saw Mr. Wink in August of 1975, more than three years after the court-approved settlement. After a series of tests, Dr. Hallman gave his opinion that Mr. Wink would not have been able to appreciate the implications of the settlement of his claim in March of 1972, although he added that Mr. Wink would believe it if he were told that the settlement would bar any further remedy. Upon this evidence, Judge West concluded that the plaintiff had

failed to sustain his burden of proof in seeking to have a Judgment set aside. He recognized that seamen are "wards of the Court," but noted that "in a Motion To Set Aside a Judgment entered by a court of competent jurisdiction, the burden is on the mover to demonstrate that the judgment was improper."

Subsequently, plaintiff appealed the denial of his motion to the United States Court of Appeals for the Fifth Circuit. On February 1, 1980 the Fifth Circuit rendered its opinion, stating that under the case of *Garrett v. Moore - McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 2d 239 (1942), the burden is upon the party claiming settlement as a defense to prove that it was entered into by the seaman with a full understanding of his rights. Accordingly, the court held that Judge West had "misallocated the burden of proof" and reversed the lower court decision and remanded the case for further proceedings.

REASONS FOR GRANTING THE WRIT

I.

Petitioners seek relief from a decision of the Fifth Circuit which they believe presents a serious danger to the deeply-rooted principles that a Judgment is the final decision of a court, and that the burden of showing that a Judgment is in some way defective and should be set aside rests with the party seeking to attack the Judgment. In holding that the former employer of a seaman bears the burden of proving that the seaman was fully capable of understanding the proceedings in which he obtained the Judgment against his employer, it is submitted that the Fifth Circuit has made a dangerous and unwarranted enlargement of the rule set out in *Garrett v. Moore - McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 2d 239 (1942). In brief, it has failed to recognize any distinction whatsoever between a release and a Judgment.

The first question presented is whether or not the rationale of the *Garrett* decision bears any relation to present-day realities. Petitioners submit that it does not and that the *Garrett* decision should be overruled.

It is by now a commonplace to say that "seamen are the wards of admiralty and that releases or settlements involving seaman's rights are subject to careful scrutiny." *Wink v. Rowan Drilling Company*, 611 F.2d 98, 100 (5th Cir., 1980). In *Garrett* the United States Supreme Court enunciated the rule that "the burden is upon one who sets up a seaman's release to

show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights." This rule with respect to seaman's releases has been consistently followed. See, *Blanco v. Moran Shipping Co.*, 483 F.2d 63 (5th Cir., 1973), cert. denied, 416 U.S. 904, 94 S.Ct. 1608, 40 L.Ed. 2d., 108 (1974); *Cates v. United States*, 451, F.2d 411, 414 (5th Cir., 1971); Benedict on Admiralty (7th Ed.), Vol. 1, Chapter IX, pp. 441-458; Norris, *The Law of Seaman* (3d Ed.) §§501-521; Bear, *Admiralty Law of the Supreme Court* (3d Ed.), §3-1, pp. 104-109.

But a review of the *Garrett* decision demonstrates that it was grounded upon a view of seaman which bears no relation to present realities. In *Harden v. Gordon*, 2, Mason 541, 11 F.Cas. 480 (No. 6047) (C.C. ME. 1923). Justice Story portrayed seamen as "thoughtless," "credulous," and with "little of the foresight and caution belonging to persons trained in other pursuits of life...."

Later, in *Brown v. Lull*, 2 Sum. 443, F.Cas. No. 2018 (1836), Justice Story stated that "seamen are of a class of persons remarkable for their rashness, thoughtlessness and improvidence.... They combine, in a singular manner, the apparent anomalies of gallantry, extravagence, profusion in expenditure, indifference to the future, credulity, which is easily won, and confidence, which is readily surprised." *Id.*, pp. 449-450. Other patronizing portraits of the "ignorant and uneducated mariner" appear in *The David Pratt*, F.Cas., No. 3597 (D.C. Me. 1839) and *Hume v. Moore - McCormack Lines, Inc.*, 121 F. 2d 336 (2d. Cir., 1941), cert denied. 314 U.S. 684, 62 S.Ct. 188, 86 L.Ed. 547.

This perception of seamen stemmed from observations of the early American sailors who indeed led a most hazardous life. Additionally, seamen were given a special solicitude because of the extreme importance to the nation of a strong navy. But the rationale for treating seamen in a different manner from any other class of person has long since disappeared. Indeed, in an article in the American Bar Association Journal, Vol. 41, p. 924 (October, 1955), Mr. Erskine Wood demonstrated how outmoded this concept of seamen had become and how unfair it was to continue to differentiate seamen from other men. He noted that "today the American seaman, due to our public school system, is as well educated and intelligent as the average workman in any other occupation. He is organized into powerful unions, which protect his rights in every way. There is even a union "delegate' for each department of the crew - the sailors, the engineers and firemen, and the stewards - on board each ship to represent them against their master. The U.S. Coast Guard also looks after their rights. The forecastle is gone. The crew lives in comfortable rooms admidships with modern baths and toilets. Their meals are served with a menu. The sailing ship and the long voyage are no more. Steam and diesel and the short voyage have taken their place. Wrecks are infrequent. Radio keeps constant communication with other ships and land. Flogging was abolished many years ago. The U.S. Public Health Service furnishes free medical and hospital services. Wages, instead of being $18.00 a month, as in the *Lull* case, are now $302.00 a month for an able-bodied seaman, plus overtime and 'penalty' wages,...."

Mr. Wood concluded his article with Justice Holmes' well-known admonition: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds on which it was laid down have vanished long since, and the rule simply presists from blind obedience to the past." "The Path of the Law", 10 Harv L. Rev. 457, 469 (1897).

Mr. Herbert R. Baer has also reflected upon the difference between the rather quaint conception of a seaman presented by Justice Story and the seaman in modern times. "The fact that the American seaman, because of our school system, is as well educated as the average worker; the fact that he is organized into powerful unions and that a union delegate is on board each ship to represent him against the master; and the fact that instead of being paid $18.00 a month as was the plaintiff in 1836 in *Brown v. Lull,* he may now earn anywhere from $300.00 to more than $500.00 a month has not altered the maritime rule of law. The seaman is still the ward and favorite of the court of admiralty." Bare, *Admiralty Law of the Supreme Court* (3d. Ed.) §3-1, pp. 104-109. One can also readily see that Mr. Baer's figures are considerably lower than the wages earned by seamen in 1980.

The above is not presented in support of an argument that seamen should be exploited, or that they should be pressured into accepting unfair settlements by overreaching employers. Rather, it is offered to suggest to the court that a reappraisal of the manner in which seamen are treated, as opposed to the burdens placed upon every other class of worker,

is in order. In *Capotorto v. Compania Sud Americana De Vapores,* 541 F.2d 985 (2d. Cir., 1976), the court held that a longshoreman is not entitled to the benefit that a seaman enjoys in attacking releases, because longshoremen do not confront the special problems faced by seaman. The court cited *Brown v. Lull and Harden v. Gordon* in support of its decision. Instead, longshoremen's releases are to be treated exactly as those entered into by other workers. Petitioners submit that the time has come to reexamine *Garrett v. Moore - McCormack Co.* and to recognize that seamen are as capable as other workers of entering into settlements and releases, and that in subsequently attacking them they should bear the burden of proving that they are defective.

II.

Accepting the rule that the employer bears the burden of proving that a seaman's release was entered into with a full understanding of his rights, it is respectfully submitted that the instant case presents a distinctly different issue. That issue is: Should the *Garrett* rule pertaining to seamen's *releases* extend as well to Federal Court *Judgments*? Petitioners submit that it should not.

In the case at bar, Mr. Wink obtained a Judgment, duly entered on March 6, 1972, signed by the late Judge R. Blake West, awarding him $17,500.00. Plaintiff's counsel has attempted to characterize this Judgment as a "sophisticated release" or a Consent Judgment, making it indistinguishable from the seamen's releases contemplated by the *Garrett* de-

cision. This characterization seriously distortes the very important and obvious differences between a release and a Judgment.

A release involves two parties, the seaman (sometimes represented by an attorney) and the employer. A settlement figure is discussed, agreed upon, papers are drafted, rights explained, and the papers are signed. It is manifestly a private contract with no neutral third party to examine the seaman, read the medical reports pertaining to his accident, and assure himself that the seaman is aware of what he is doing. The entire foundation of the *Garrett* case stems from a judicial recognition that the ship owner may somehow take advantage of the seaman and persuade him to enter into a settlement which is out of proportion to his possible recovery and which the seaman does not understand.

The "friendly Jones Act suit" presents an entirely different picture. A Complaint is filed. An Answer and Defenses are filed. The parties make stipulations of fact. The plaintiff and the employer appear in court before the Judge and present the settlement to the Court for its approval or rejection. Having a full opportunity to question the seaman as to the nature of the accident and the injury, to satisfy himself that the seaman understands the nature of the proceedings, to read the medical reports and to determine whether the agreement is fair and equitable, the Judge acts independently of the parties and can (and in many cases does) decline to approve the settlement if he finds that it is not in the best interests of the seaman. In the instant case, Judge West performed his duties and approved the settlement, signing a Judgment disposing of the case.

It is axiomatic that the party attacking a Judgment of a Federal Court of competent jurisdiction bears the burden of showing that the Judgment was defective in one of the ways mentioned in Fed. R. Civ. Proc 60(b). *United States v. Harrison County Mississippi*, 463 F.2d 1328 (5th Cir., 1972); *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir., 1978). Petitioners submit that the Fifth Circuit decision had no basis whatsoever for exempting a seaman from this well-settled requirement. No case, prior to the Fifth Circuit decision, had applied the *Garrett* rationale to a Federal Court Judgment.

The Fifth Circuit did recognize that a Judgment had been entered, but stated that since it had no record of the proceeding it could not "evaluate the degree of independence exercised by the District Court in reviewing the proposed settlement." It added that "it is... possible that the court's investigation was merely perfunctory and fell short of the careful scrutiny commanded by *Garrett* and its progeny." *Wink v. Rowan Drilling Company*, 611 F.2d 98, 101 (5th Cir., 1980). Despite Judge West's statement in his Memorandum and Order that his "invariable practice" was to carefully explain to the seamen his rights and alternatives, the Fifth Circuit was unwilling to make the "leap of faith" necessary to find that the court's invariable practice was followed. Apart from its cynical refusal to accept the word of a fellow member of the judiciary, this statement ignores the fact that Judge West made Findings of Fact and Conclusions of Law in connection with the Judgment which he rendered.

Whatever one may think of the "friendly Jones Act suit" procedure, it is a fact that for at least 20 years it has been a recognized procedure in the United States Court for the Eastern District of Louisiana. Literally thousands of Judgments have been rendered pursuant to this procedure. It developed, undoubtedly, from the extremely tough burden placed upon employers in drafting and obtaining releases which would be reliable in view of the *Garrett* case. Rather than subject themselves to the uncertainty of a release, employers quite naturally preferred to bring the matter straight to the court, a forum which would certainly certify that the seamen had had his rights explained to him and understood his position. If the Judgment of the Fifth Circuit is allowed to stand, there is small doubt that a rash of lawsuits will ensue seeking to attack prior Judgments of this nature. As a practical matter, employers will be faced with the difficult task of affirmatively showing that the seamen understood his rights when he entered into the settlement inasmuch as the court generally did not require the proceedings to be recorded. In view of the strong policy favoring the finality of Judgments, petitioners respectfully submit that the *Garrett* rule pertaining to seamen's releases should not be extended to Judgments of a Federal Court.

III.

The third question presented is whether or not the Motion To Set Aside the Judgment was timely filed in accordance with Fed. R. Civ. Proc. 60(b). This rule provides that a motion seeking to set aside a Judgment on grounds of fraud, misrepresentation, or other misconduct of an adverse party

shall be made not more than one year after the Judgment, Order, or proceeding was entered or taken. An examination of the Motion For Relief From Judgment filed by Plaintiff on June 4, 1974 reveals that the grounds alleged were fraud and misrepresentation on the part of the employer. Since the Motion was filed more than two years after the Judgment under attack, it is clear that the motion was not timely filed.

Plaintiff, however, sought to place this matter within the scope of subsection 6 of Rule 60(b), which provides that Judgments can be set aside for "any other reason justifying relief from the operation of the Judgment." The period in which to bring a claim under subsection 6 is "within a reasonable time." The Fifth Circuit agreed with this construction, citing the case of *Clarke v. Burkle,* 570 F.2d 824 (8th Cir., 1978). In that case, the court stated that mental incompetency was a ground for invoking subsection 6 of Rule 60(b).

It should be noted that in his Motion For Relief From Judgment plaintiff did not allege that the Judgment was defective because of his mental incompetence, but rather that "the court was *misled* by the defendant and its insurer as to the extent of the complainant's mental competence." In short, the motion is grounded upon fraud or misrepresentation, not mental incompetence. Furthermore, it is submitted that Rule 60(b) should be limited to cases of "extraordinary circumstances." *Ackermann v. United States,* 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950); *Klapprott v. United States,* 335 U.S. 601, 69 S.Ct. 384, 92 L.Ed. 266 (1949). Given the

broad power described in Rule 60(b) 6, it is submitted that the instant case does not present one of exceptional circumstances and that for the Fifth Circuit to allow the motion as timely filed based upon a hypothetical condition of mental incompetence, not pleaded in the Motion For Relief From Judgment, is improper and an abuse of its discretion.

CONCLUSION

Petitioners, Rowan Drilling Company and The Fidelity & Casualty Company of New York, respectfully submit that the rule pertaining to seamen's releases set out in *Garrett v. Moore-McCormack*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 2d 239 (1942), is demonstrably outdated and should be overruled; that the *Garrett* decision should not apply to cases in which seamen have obtained *judgments* against their employers, which issue is one of first impression; and finally that the Motion To Set Aside Judgment filed by respondent on June 4, 1974, more than two years after the judgment under attack was entered, was not timely filed and should have been denied on that basis.

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CERTIFICATE OF SERVICE

PERSONALLY BEFORE ME, came and appeared, LAWRENCE J. ERNST, counsel for Petitioners, Rowan Drilling Company and The Fidelity & Casualty Company of New York, who did depose and say:

That, he is attorney for Petitioners, Rowan Drilling Company and The Fidelity & Casualty Company of New York;

That in compliance with rules 21 and 33 of the United States Supreme Court, he has mailed three copies of the Petition for Writ of Certiorari to attorneys for respondent, Bruce C. Waltzer, 335-337 Decatur Street, Vieux Carre', New Orleans, Louisiana, 70130; Joseph Cohn and David J. Letvin, 412 Missouri Avenue, East St. Louis, Illinois, 62201; and John D. Miller, Suite 218, Masonic Building, 227 St. Ann Street, Owensboro, Kentucky, 42301, this 25th day of April, 1980.

New Orleans, Louisiana.

Lawrence J. Ernst

LAWRENCE J. ERNST

Sworn to and subscribed
before me this 25th day
of April, 1980.

E. Phelps Gay

NOTARY PUBLIC

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH A. WINK	CIVIL ACTION
VERSUS	NO. 72-649
ROWAN DRILLING COMPANY, ET AL	SECTION "H"
Consolidated with	
JOSEPH A. WINK	CIVIL ACTION
VERSUS	NO. 74-1543
ROWAN DRILLING COMPANY, ET AL	SECTION "H"

MEMORANDUM AND ORDER

The above-captioned cases seek to have a Jones Act judgment set aside, pursuant to F.R.C.P. 60(b), and to pursue a Jones Act claim against the plaintiff's former employer.

The case captioned *Joseph A. Wink v. Rowan Drilling Company, et al,* C. A. 72-649, was allotted to Section "E" of this Court. However, on March 6, 1972, this Section ("H") entered judgment on the Jones Act claim in favor of the plaintiff for the sum of $17,500.00. Plaintiff was not represented by counsel, this being a "friendly" Jones Act settlement. No independent record of the conference and judgment entered

pursuant thereto exists, but it is the Court's invariable practice to explain carefully to a plaintiff under the circumstances all of his rights and alternatives prior to the approval of any settlement. Moreover, the Court will not approve a settlement if it appears that the plaintiff is incapable of understanding his rights. At the time of the entry of judgment, all available medical evidence was presented to the Court, and this, too, was reviewed prior to approval of the settlement.

On June 4, 1974, over two years after the entry of judgment, the plaintiff filed a motion to set the judgment aside. On the same date, a new Jones Act claim on behalf of the plaintiff was filed against his former employer. This case bears Docket No. 74-1543. The basis of the motion to set aside the judgment is that the plaintiff was incapable of understanding the nature of the proceedings and the effect of the entry of judgment in March of 1972.

Pursuant to the request of counsel for plaintiff, the Court permitted the taking of the depositions of Dr. William Meacham, plaintiff's treating physician, and Dr. James Hallman, a psychologist, the latter being limited to the issue of the degree of the plaintiff's understanding at the time the judgment was entered. The last deposition was taken on January 16, 1976, and from that time until March 30, 1977 the plaintiff has not taken any action. [1]

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1. Indeed, this case has been on the Court's call docket several times over the past years.

On March 30, 1977 the plaintiff sought to have the judgment entered on March 6, 1972 set aside, or, alternatively, to have an evidentiary hearing held as to the plaintiff's capacity in 1972. The basis of this motion is the two depositions previously mentioned.

The Court has carefully read the depositions, as well as the medical evidence available on March 6, 1972, and, for the reasons stated herein, is of the opinion that an evidentiary hearing on the plaintiff's capacity to understand the proceedings five years ago would not shed any further light on the matter than the two depositions which the Court has permitted to be taken, and that the plaintiff has failed to sustain his burden of proving the 1972 judgment invalid.

At the outset, the Court recognizes that seamen are wards of the Court; however, in a motion to set aside a judgment entered by a court of competent jurisdiction, the burden is on the mover to demonstrate that the judgment was improper. See generally, 11 Wright & Miller, *Federal Practice & Procedure*, § 2851, et seq. [2] The depositions of Drs. Hallman and Meacham do not serve to sustain this burden. Dr. Hallman, a clinical psychologist, saw the plaintiff in August, 1975 and administered the Wechsler Adult Intelligence Scale, the Minnesota Multiphasic Personality Inventory, the Rorschak and the

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2. Moreover, since the plaintiff appears to be alleging fraud as the basis for setting aside the judgment, he may well be barred by the one-year prescriptive period contained in F.R.C.P. 60 (b) (3).

Bender-Gestalt tests over a period of one month in 1975 (Dep. pg. 11). Dr. Hallman concluded that the plaintiff's injury could affect his judgment and that he would not have been able to appreciate the implications of the Jones Act settlement (pg. 29). However Dr. Hallman then stated that the plaintiff "would believe it if someone told him . . . (that agreeing to settlement would bar any future remedy) He would believe this as a fact if someone told him it was a fact." (pg. 30).

As noted earlier, it is the Court's long-standing practice to inform a Jones Act plaintiff of his rights prior to the approval of any settlement. Moreover, Dr. Hallman's examinations occurred in August and September of 1975, and he merely inferred from that what the plaintiff's condition was in March, 1972. Certainly, the best evidence of the plaintiff's condition in March, 1972 is available from the then existing medical reports.

The plaintiff seeks to rely on the deposition of Dr. Meacham, who operated on the plaintiff prior to the settlement. However, a review of the deposition, taken on June 25, 1975, indicates that, although the plaintiff was "dull", he was, in no way, incapable of comprehending the proceedings which culminated in the judgment. Indeed, on January 5, 1972, Dr. Meacham's report indicated that the plaintiff could probably return to work within four to six weeks. This was bolstered by the doctor's January 27, 1972 report. In fact, that was the last time that Dr. Meacham saw Mr. Wink.

The other available medical evidence lends further support to the conclusion that the plaintiff, in March of 1972, was not incapable of understanding the nature of the proceedings. Dr. Carl F. Culicchia, on December 15, 1971, noted that "the neurologic examination shows no abnormality." It is to be noted that Dr. Culicchia was one of the plaintiff's treating physicians, and his opinion is, therefore, entitled to considerable weight, as is the opinion of Dr. Meacham.

The Court recognizes the responsibility which it has to insure that seamen are protected and not taken advantage of. However, in this case, the record is clear that Mr. Wink was not the subject of overreaching or harrassment. The medical reports available at the time of entry of judgment all indicate that the plaintiff was making a good recovery. Only Dr. Hallman, by virtue of tests conducted over three years after the entry of judgment, indicates that the plaintiff was incapable of understanding the proceedings. But such conclusion is seriously undermined by the fact that Dr. Hallman stated that Mr. Wink would believe it as fact if someone told him he was giving up all his rights, even if his condition got worse, and, as stated, the Court's practice is to do so.

Thus, it appears clear that the plaintiff has failed to sustain his burden of proof in seeking to have the judgment set aside, and, accordingly, IT IS ORDERED that the plaintiff's motion to set aside the judgment entered in *Joseph A. Wink v. Rowan Drilling Co. and the Fidelity & Casualty Co. of New York,* C. A. 72-649, be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that *Joseph A. Wink v. Rowan Drilling Co. and the Fidelity & Casualty Co. of New York,* C. A. 74-1543, be, and the same is hereby, DISMISSED on the basis of *res judicata.*

New Orleans, Louisiana, this 20th day of April, 1977.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH A. WINK	CIVIL ACTION
vs	NO. 72-649
ROWAN DRILLING COMPANY and	SECTION "H"
THE FIDELITY & CASUALTY COMPANY OF NEW YORK	

ORDER

For the written reasons set forth in this Court's memorandum and order of April 20, 1977;

IT IS ORDERED that plaintiff's motion to set aside judgment is hereby DENIED.

New Orleans, Louisiana, this 16th day of July, 1977.

UNITED STATES DISTRICT JUDGE

Ent. 4/22/76 Nunc Pro Tunc on 7/15/77

APPENDIX B

Joseph A. WINK, Plaintiff-Appellant,

v.

ROWAN DRILLING CO. et al.,
Defendants-Appellees.

No. 77-2093.

United States Court of Appeals,
Fifth Circuit.

Feb. 1, 1980

Appeal from the United States District Court
for the Eastern District of Louisiana.

Before MORGAN, RONEY and GARZA, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

This appeal involves a seaman's action against his former employer which was dismissed by the district court on grounds of res judicata. In 1974 the seaman simultaneously filed a Fed.R.Civ.P. 60(b) motion to set aside a 1972 judgment in a "friendly Jones Act suit" and a new action against his employer seeking additional damages on the same claim which formed the basis of the prior judgment. In his motion to set aside the seaman alleged that his employer had perpetrated a fraud upon the court and misled the seaman as to the extent of his injury, his mental competence, and the guarantee of a lifetime job. The court held that the seaman had not met the burden of proving the judgment invalid and, therefore, denied the

motion for relief from judgment and dismissed the new action on the basis of res judicata. Because we believe the district court misallocated the burden of proof in this case, we reverse and remand for further proceedings.

I.

In 1971 Joseph A. Wink, a Jones Act seaman, was working aboard a Rowan Drilling Co. (Rowan) drilling tender in the Gulf of Mexico when he was struct on the head by a joint of pipe. As a result of this accident, Wink sustained a serious head injury requiring immediate medical attention and hospitalization. After his initial treatment involving the surgical removal of the depressed and fragmented bones of his skull, Wink returned to his home in Kentucky where a local surgeon referred him to Dr. William F. Meacham, a neurosurgeon at Vanderbilt University School of Medicine. Dr. Meacham performed a tantalum cranioplasty, a surgical procedure consisting of the insertion of a metal plate into the skull.

Shortly after he was released to return to work, Wink, who was not represented by counsel, agreed to settle any legal claim he may have had against his employer. On March 6, 1972, a seaman's complaint prepared by Rowan's counsel was filed in district court along with medical reports of Wink's treatment. Simultaneously, Rowan filed an answer and a joint stipulation of facts signed by both of the parties. The stipulation of facts stated that Wink was 50 percent contributorily negligent in causing his injury and limited his recoverable damages to $17,500. On that same day, March 6, the

district court approved the settlement and entered a judgment which incorporated and adopted the stipulation of facts.

On June 4, 1974, Wink filed a Rule 60(b) motion to set aside the 1972 judgment alleging primarily that Rowan had misled the court as to the extent of his injuries and his mental competence. On that same date Wink filed a new Jones Act suit against Rowan seeking to recover additional damages for the injuries he suffered in 1971. The court allowed Wink to take the deposition of Dr. Meacham and, over Rowan's objection, the deposition of Dr. James C. Hallman, a clinical psychologist. [1] The court held that Wink had failed to carry the burden of proving either his own incapacity or fraud and overreaching by the defendant. Accordingly, the court denied the motion for relief from judgment and dismissed the new action on the basis of res judicata.

II.

[1,2] It well established that seamen are the wards of admiralty and that releases or settlements involving seaman's rights are subject to careful scrutiny. The burden is upon the party claiming settlement as a defense to prove that it was en-

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1. Dr. Hallman, who examined Wink in 1975, stated positively that Wink would not have been able to appreciate the implications of the settlement agreement he entered into in 1972. Dr. Meacham's testimony was less favorable to plaintiff's position. He testified that when he examined Wink in 1972 he found him to be "dull" and to have "a very flat effect." However, he concluded that Wink had no neurological disabilities, needed no further treatment, and could return to "full occupational activities."

tered into by the seaman with a full understanding of his rights. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246-48, 63 S.Ct. 246, 87 L.Ed. 239 (1949); *Gueho v. Diamond M. Drilling Co.*, 524 F.2d 986, 987 (5th Cir. 1975), *cert. denied*, 425 U.S. 976, 96 S.Ct. 2177, 48 L.Ed.2d 800 (1976); *Blanco v. Moran Shipping Co.*, 483 F.2d 63 (5th Cir. 1973), *cert. denied*, 416 U.S. 904, 94 S.Ct. 1608, 40 L.Ed.2d 108 (1974); *Cates v. United States*, 451 F.2d 411, 414 (5th Cir. 1971). "The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding." *Garrett v. Moore-McCormack*, 317 U.S. 239, 248, 63 S.Ct. 246, 252, 87 L.Ed. 239 (1942).

[3] Rowan concedes the validity of these principles but points out that this case does not involve a mere settlement or release but a *final judgment* of a federal district court. According to Rowan, this judgment resulted only after the court was fully satisfied that the seaman understood his rights and appreciated the nature and consequences of the proceeding. Because the court acted independently of the parties in approving the settlement agreement, Rowan argues that we should reject Wink's attempt to characterize the 1972 judgment as a "consent judgment" or "sophisticated seaman's release."

The difficulty with Rowan's argument is that this court has no record of the 1972 proceeding from which to evaluate the degree of independence exercised by the district court in reviewing the proposed settlement. It is of course possible that the court carefully reviewed the stipulation of facts and

medical reports, questioned the seaman closely, and made certain that the seaman was entering into a just and fair settlement of his claim. However, it is also possible that the court's investigation was merely perfunctory and fell short of the careful scrutiny commanded by *Garrett* and its progeny. In its memorandum opinion the court referred to its "invariable practice" of carefully explaining to the seaman his rights and alternatives before approving a settlement and stated that it would not allow a party to participate in a proceeding he did not fully understand. Unfortunately, the court's subjective awareness is not available to us in our review, and we are unwilling to made the "leap of faith" necessary to find that the court's invariable practice was followed in this case.

In many respects this case is similar to our per curiam opinion in *Gueho v. Diamond M. Drilling Co.*, 524 F.2d 986 (5th Cir. 1975), *cert. denied*, 425 U.S. 976, 96 S.Ct. 2177, 48 L.Ed.2d 800 (1976). There the district court entered a judgment [2] approving a settlement agreed to by the seaman, who was unrepresented, and his employer. Later that same day, the employer terminated the seaman's employment. The seaman then sought relief from judgment on grounds that his employer had led him to believe that the settlement included a promise of continued employment. After a hearing, the court vacated its prior judgment and granted plaintiff's motion for a

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2. Although the *Gueho* opinion does not refer to a court "judgment," a review of the district court's docket entries reveals that a judgment in favor of plaintiff was entered in that case.

new trial. In affirming, this court stated *the burden was on the employer* to prove that the seaman had entered into the settlement with an informed understanding of his rights and a full appreciation of the settlement's consequences. The reasons for placing the burden of proof on the employer are even stronger in a case where there is no evidence that the district court became the seaman's "trustee" as required under the wardship theory of *Garrett v. Moore-McCormack Co., supra.*

III.

Generally, public policy requires that a party seeking relief from a two-year-old judgment should bear the burden of proving that judgment invalid. As in *Gueho,* however, the judgment in this case did not result from a litigated determination of the merits of the case. Both the pleadings and the joint stipulation of facts were prepared by Rowan and agreed to by the seaman without any advice from outside counsel. The court's judgment, filed the same day as the pleadings, mirrors the language used in the stipulation of facts. And, most importantly, the absence of any record of the 1972 proceeding raises the possibility that the court merely rubber-stamped the parties' extrajudicial agreement. We believe that these circumstances require that Rowan, rather than the seaman, bear the burden of proving that Wink was fully capable of understanding the 1972 proceedings and appreciated the consequences of his acts. See *Scola v. Boat Francis R., Inc.,* 546 F.2d 459 (1st Cir. 1976).

[4] Accordingly, we reverse the district court and remand with instructions that Wink be permitted to proceed

with his new action against Rowan. Rowan may claim the prior settlement as a defense, but it must bear the burden of proving that Wink had an informed understanding of the significance of the settlement when he signed it. Should Wink prevail at trial on this issue, the court should set aside the prior judgment [3] and proceed accordingly.

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3. Although over one year had elapsed from the date of the 1972 judgment when Wink filed his motion to set aside, we believe that this is a proper case for involving clause (6) of Fed.R.Civ.P. 60(b). See *Clarke v. Burkle*, 570 F.2d 824 (8th Cir. 1978). Furthermore, we believe that plaintiff filed his motion within a "reasonable time" as required by Rule 60(b)(6).

Supreme Court, U. S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

No. 79-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN DRILLING COMPANY AND THE FIDELITY & CASUALTY COMPANY OF NEW YORK,
Petitioners,

versus

JOSEPH A. WINK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 79-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROWAN DRILLING COMPANY AND THE FIDELITY & CASUALTY COMPANY OF NEW YORK,
Petitioners,

versus

JOSEPH A. WINK,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Eastern District of Louisiana rendered a Memorandum and Order on April 20, 1977, denying respondent's Motion for Relief From Judgment. The Minute Entry embodying the Order was signed by Judge R. Blake West on July 16, 1977. Copies of the Memorandum and Order and the Minute Entry are contained in Appendix A of this Petition.

The opinion of the Court of Appeals for the Fifth Circuit is reported at 611 F.2d 98 and a copy is contained in Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals' reversal of the District Court's dismissal of Respondent's Jones Act suit on the basis of res judicata presents questions ripe for review inasmuch as the Court of Appeals remanded the case for trial.

2. Whether, on the barren record before this Court, review should be granted to reconsider the vitality of the rule in *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed 2d 239 (1942).

STATUTES AND RULES INVOLVED

The pertinent statutes and rules are printed in the Petition. (Pet. vii-viii)

STATEMENT OF THE CASE

The Petitioners in this case effected a settlement with the Respondent, concededly a Jones Act seaman who was unrepresented by counsel, by employing the following technique: On March 6, 1972 a typewritten pro se complaint, obviously prepared by Petitioners' counsel, was filed in the District Court as No. CA-72-649. Simultaneously, the Petitioners filed an answer and a joint stipulation of facts. On that same date, the court filed a consent judgment for $17,600.00 which incorporated and adopted the stipulation of facts. No delay was allowed in paying the settlement as a satisfaction of judgment was filed that same date.

Joseph Wink, the Respondent, had been employed by Petitioners as a derrick man in the Gulf of Mexico when, on June 4,

1971, he sustained a "very serious head injury" resulting in: 1) a depressed skull fracture, which later required surgical craniotomy, 2) epidural hematoma, 3) cerebral contusion, 4) hemiparesis, 5) a cranial defect in the right fronto-temporal area, 6) an abnormal EEG and 7) "definite amnesia for the immediate events surrounding the injury."

Whoever, other than the Respondent, prepared the Complaint, was somewhat moderate in his expectations as the prayer for damages was limited to $40,000 and no demand for jury trial was made. In addition, whoever prepared the Stipulation of Facts for Respondent's signature was likewise moderate in Respondent's expectations as the document extracted from Respondent a concession of his own 50 per cent contributory negligence even though he suffered from a "definite amnesia for the immediate events surrounding" his injury.

On June 4, 1974, Respondent, now represented by counsel, filed a complaint against his employer, Petitioners herein, based upon the General Maritime Law and the Jones Act, 46 U.S.C., §688 as No. CA-74-1543. At the same time, the prior settlement in case No. CA-72-649 was challenged by filing a Motion praying that the court set aside the judgment of March 6, 1972. As grounds therefore, Respondent alleged that he was misled by the Petitioners and its insurer as to extent of his own injuries, that further misleading was accomplished with respect to Respondent's mental competence, and with respect to a guarantee of a lifetime job made by Petitioners to Respondent, and that all of the pleadings filed in 1972 were prepared by Petitioners' counsel.

Petitioners did not file an Answer or Motion to dismiss Respondent's suit in No. CA-74-1543.

In addition to the matters contained in Respondent's Motion for relief from judgment, Respondent filed a Memorandum which alleged "that the procedure undertaken by the Petitioners was nothing more than a sophisticated seaman's release and

subject to attack" as such. In praying for setting aside the 1972 judgment and a trial on the merits, the Memorandum further requested, in the alternative, "a full evidentiary hearing in order to determine whether or not Joseph Wink was capable of understanding the nature of the March 6, 1972, proceedings; whether or not the settlement should be set aside because of overreaching." The District Court, after considering only depositions concerning Respondent's medical and mental disability at the time of the entry of judgment, and presuming the burden of proof to be on Respondent, denied Respondent's Motion to set aside the judgment, denied Respondent's request for an evidentiary hearing on the question of his mental capacity in March, 1972, did not rule on the prayer for a hearing on the issue of Petitioners' overreaching, and dismissed the Complaint as barred by res judicata.

The Court of Appeal reversed the District Court and remanded the case to the District Court with instructions that Respondent be permitted to proceed with his new action at which time the Petitioners could assert the prior settlement as an affirmative defense. This result was predicated on the grounds that no record having been made before the District Court, no means were available whereby the Court of Appeals could test the validity of the settlement effected by the Petitioners.

REASONS FOR DENYING WRIT

I.

Because the Court of Appeals Held the District Court Erroneously Applied Res Judicata to Respondent's Jones Act Suit, and Remanded the Case for a Trial Where That Issue Could Be Raised By Petitioners As An Affirmative Defense, This Cause Is Not Ripe for Review By This Court.

The review sought here by Petitioners is abortive because the Fifth Circuit Court of Appeals remanded the case to district court for trial; the order of the Court of Appeals is, therefore, interlocutory in nature, rendering this case unripe for review in its present posture. A brief review of the proceedings below demonstrates this.

Petitioners' second and third questions presented are interrelated so as to make appropriate their discussion together. A conceptual confusion has tracked Petitioners throughout the proceedings below and in their Petition before this Court. The Respondent filed, within the time limited by statute, 46 U.S.C. §688, a Jones Act suit seeking indemnification for employment injuries. At the same time, he filed a Motion pursuant to Rule 60(b) to set aside the judgment in the "friendly Jones Act suit" filed by his employer's counsel. The Court of Appeals reversed the District Court because the District Court refused to allow Respondent to proceed to a hearing on the second suit, which would have necessarily determined the validity of the judgment in the "friendly" suit if the Petitioners had raised the settlement judgment as an affirmative defense; instead, the District Court dismissed the second suit on the ground of res judicata. Actually, it is the District Court's dismissal of Respondent's second action which is the precise target of the reversal by the Court of Appeals and it is arguable whether the District Court's action in denying Respondent's Rule 60(b) Motion was critical for the

opinion of the Court of Appeals, as the validity of the judgment in the "friendly Jones Act" suit is yet to be judicially determined; the Court of Appeals made no such determination, but relegated that function to the trial court on remand. As the opinion states: "Accordingly, we reverse the district court and remand with instructions that Wink be permitted to proceed with his new action against Rowan. Rowan may claim the prior settlement as a defense, but it must bear the burden of proving that Wink had an informed understanding of the significance of the settlement when he signed it. Should Wink prevail at trial on this issue, the court should set aside the prior judgment and proceed accordingly." (A-13, 14)

The posture of this case is thus one which has not ripened so as to make appropriate the argument which Petitioners have raised.[1]

Under these circumstances, although this Court has jurisdiction to review the Court of Appeals' order, the grant of certiorari would be improvident, or at least, premature. As stated by Mr. Justice Stevens, dissenting in *Estelle* v. *Gamble*, 429 U.S. 97, 114, 50 L.Ed2d 251, 266, 97 S.Ct. 285, the normal practice of this Court is to deny interlocutory review. He cited R. Stern and E. Gressmon, Supreme Court Practice whose 5th. edition, 1978 states at p. 300:

> "The Supreme Court will not usually grant certiorari to review a nonfinal judgment, such as one remanding the case to the district court for a new trial or one sanctioning the issuance or denial of a preliminary injunction, in the

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[1] If the Court of Appeals had, in fact, entered an order granting relief under the Rule 60(b) Motion which vacated the judgment in the "friendly" suit, leaving the case pending for further determination, the order would be analogous to an order granting a new trial. Being interlocutory in nature, questions would arise as to appealability. Moore's Federal Practice, Vol. 7, §60.30(3), p. 431-432.

absence of some exceptional reason. As stated in *American Construction Co.* v. *Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384, "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." See *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 584-585; *Cobbledick* v. *United States*, 309 U.S. 323, 324-325; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (lack of finality "of itself alone furnished sufficient ground for the denial"); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). Mr. Justice Stevens, dissenting in *Estalle* v. *Gamble*, 429 U.S. 97, 114, referred to "the Court's normal practice of denying interlocutory review."

This is not the "extraordinary" case which would justify issuance of a writ of certiorari prior to a final judgment. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258, 60 L.Ed. 629, 633.

II.

Where Traditional Policy, As Evinced by Congressional Enactment and Judicial Doctrine, Puts Seamen in a Favored Status, the Rule in *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942), Placing the Burden of Sustaining the Validity of a Seaman's Settlement on the Employer, Should Not Be Disturbed.

Conceding that the rule proclaimed in *Garrett* v. *Moore McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942), whereby an employer is required to sustain the burden of establishing the validity of a seaman's settlement of an employ-

ment injury claim, "has been consistently followed" (Petition, p. 7), Petitioners nevertheless assert the policy considerations which underpinned the rationale for Garrett's rule have been dissipated by evolving socio-economic factors which have, it is claimed, narrowed the recognized disparity in the bargaining positions of the maritime employer and the seaman. One would expect so audacious an approach would be fully buttressed by empirical data and documentation, but Petitioners seem content in relying only on two pages of short quotations from two commentators whose knowledge of the maritime industry and its seamen is entirely obscured.

The policy considerations which prompted the rule in *Garrett* have been persistently recognized and supported. As the court stated in *Kelcey* v. *Tankers Company*, 217 F.2d 541, 546 (2d Cir., 1954), "...allocation of the burden of proof rests on policy considerations. The policy vis-a-vis a seaman's release has been emphatically declared by the Supreme Court.

The favored status of seamen rests not only on judicial doctrine, but also on Congressional policy. *Bainbridge* v. *Merchants & Miners' Transportation Co.*, 287 U.S. 278, 53 S.Ct. 159, 77 L.Ed. 302 (1932), citing *Robertson* v. *Baldwin*, 165 U.S. 275, 287, 17 S.Ct. 326, 41 L.Ed. 715, 719 (1896), which points out that as early as 1790 Congress enacted legislation (1 Stat. at L. 131, §7) for the protection and benefit of seamen because Congress recognized their status as "wards of admiralty". Although Congress has not addressed directly the issue of seaman's releases, the considerable body of statutes extant, investing seamen with benefits denied the shore worker, clearly evince a Congressional policy to spread a protective umbrella over the seaman. As recently as 1972 Congress spoke on the advisability, indeed the necessity, of distinguishing the seaman from his more pedestrian shoreside fellow worker. In House Report No. 91-1441 on the 1972 Amendments to the Longshoremens' & Harbor Workers' Compensation Act, P.L. 92-576, the Committee reported: "The rationale which justifies

holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port." 1972 United States Code Congressional & Administrative News, Vol. 3, p. 4698, 4703.

The deference paid by the courts to legislative policy was aptly described by Justice Holmes in *Johnson* v. *United States*, 163 F.30, 32, quoted with approval in *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 351 57 S.Ct. 452, 81 L.Ed. 685, 690 (1936), when he stated if the legislature "...has intimated its will, however indirectly, that will should be recognized and obeyed." The *Garrett* opinion recognized the policy of Congressional solicitude for seamen when it referred, in support of its conclusion, to that provision of the Longshoremens' & Harbor Workers' Compensation Act, 33 U.S.C. 915, 916 which invalidates all releases not made under the express terms of the Act. Significantly, this provision was not changed by the 1972 amendments to the Act, Pub. L. No. 92-576, 86 Stat. 1251. See *Capotorto* v. *Compania Sud Americana de Vapores, Etc.*, 541 F.2d 985 (2d Cir. 1976), which notes this Congressional action and reasserting "The particularly authoritarian relationship of shipowners and their representatives to seamen and the isolation of the latter from the legal, economic, and psychological support of a landbased community may put the seaman at a serious bargaining disadvantage." 541 F.2d at 987.

If, as Petitioners state, Justice Holmes questioned the cold hand of stare decisis, he also reminded us that "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 348, 41 S.Ct. 506, 65 L.Ed. 963 (1920). That page of history reflecting the favored status of seaman was sketched in masterly fashion by Judge Frank in *Hume* v. *Moore-McCormack Lines*, 121 F.2d 336 (2d Cir. 1941) where he demonstrated that the traditional rule which casts upon the employer the burden of proving the validity of a seaman's settlement is predicated not only on the continuing disparity of the

bargaining power between the seaman and his employer, but also on the need—"surely pertinent today"—of promoting the national defense "by inducing men to accept employment in an arduous and perilous service." *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 528 58 S.Ct. 651, 653, 82 L.Ed. 993 (1937).

Petitioners argue the Fifth Circuit has improperly extended the *Garrett* doctrine to judgments. It is sufficient answer to point out, as did the Fifth Circuit, that the judgment involved herein "did not result from a litigated determination of the merits of the case. Both the pleadings and the joint stipulation of facts were prepared by Rowan and agreed to by the seaman without any advice from outside counsel. The Court's judgment, filed the same day as the pleadings, mirrors the language used in the stipulation of facts. And, most importantly, the absence of any record of the 1972 proceeding raises the possibility that the court merely rubber-stamped the parties' extrajudicial statement." (A-3) The applicability of res judicata to consent judgments has been attenuated in non-maritime cases as well. See *Kaspar Wire Works, Inc.* v. *Leco Engineering and Mach.*, 575 F.2d 530, 538 (5th Cir. 1978), where the court stated:

> "Such a consent decree, however, is not identical in effect to the conclusion reached by a judge after a trial; thus, an appeal on the merits usually does not lie from it. The parties' proposal does not reflect the considered judgment of a judicial officer: it has been forged by them alone as an adjustment of conflicting claims and it is not a tempered determination of fact and law after the annealment of an adversary trial. Depending on the temperament and the calendar of the trial judge, the decree may be subject to serious scrutiny, superficial examination, or perfunctory inspection accompanied by a hosanna because another case is off the calendar. Indeed, it appears to be the view of some members of the bar that judicial examination of the terms of a private settlement is intrusive."

Investing consent judgment settlement with the same sanctity as a contested judgment, thereby subjecting the seaman to the burden of proof, time limitations, and procedural difficulties inherent in Rule 60 has the effect of undermining by subversion the broad policies which underpin the admiralty's traditional protective relationship with seamen. It would allow the employer, by using the imprimature of the court, to escape his traditional burden thereby rendering impregnable a settlement which contains the seeds of vulnerability.

Petitioners during neither the District Court nor Court of Appeals proceedings challenged the vitality of the *Garrett* rule; indeed, the opinion of the Court of Appeals specifically recites that Petitioners conceded the validity of the principles followed since *Garrett*. (A-11) On the impoverished record before this Court, considrable temerity is required to seek to disrupt almost two centuries of Congressional policy favoring the seaman and to attempt impairment of the continuing virility of the holding in *Garrett* v. *Moore-McCormack*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed 239 (1942).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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